Supreme Court, U.S.
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In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-48

JUDITH BARBARA WILLIAMSON,
Respondent,

v.

WESTERN PACIFIC DREDGING CORP.,
Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent believes the Court of Appeals most accurately stated the questions presented in this case in the first paragraph of its Opinion [Pet. Br. App. p. 25].

The questions presented are whether or not "a seaman employed aboard defendant's dredge, who lived at home and drove to and from work daily, . . ., and

(who died) because of injuries sustained in an automobile accident while commuting" can recover

(a) for maintenance and cure?

(b) for damages under the Jones Act?

Each of the courts below answered each of the above questions in the affirmative.

STATUTES INVOLVED

In addition to the Jones Act referred to in petitioner's brief, liability was predicated upon the Federal Employer's Liability Act, 45 U.S.C. § 51, which creates a cause of action in employees who incur ". . . injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."

STATEMENT OF THE CASE

The case is stated fully in the Opinion of Judge Kilkenny, who at the time of the decision was the trial judge in the District Court [Pet Br. App. p. 1].

SUMMARY OF ARGUMENT

The petition for certiorari should be denied for the reason that the decision below is not in conflict with the decision of any other court of appeals on the same matter, does not decide an important question of law which has not been settled by this Court, and does not decide a federal question in a way in conflict with

applicable decisions of this Court. The recovery for maintenance and cure, and for damages under the Jones Act are logical interpretations and applications of the decisions of this Court in earlier maintenance and cure and Jones Act decisions.

ARGUMENT

First, there are *no* conflicting decisions. Petitioner refers to the case of *McCall* v. *Overseas Tank Ship*, 222 F.2d 441, 1955 A.M.C. 1175 (C.A. 2nd, 1955), which was decided eleven years before this Court's decision in *Hopson* v. *Texaco, Inc.*, 383 U.S. 262, 86 S. Ct. 765, 15 L. Ed. 2nd 740, 1966 A.M.C. 281 (1966). *McCall* involved the death of a seaman who had been signed off in Shanghai, but, while being repatriated by his employer, was killed on a flight of Northwest Orient Airlines in Alaska. We suggest *McCall* is clearly distinguishable from the case at bar, and probably overruled by *Hopson*.

In *Sellers* v. *Dixilyn Drilling*, 433 F.2d 446 (C.A. 5th, 1970), the court of appeals held that plaintiff was not entitled to maintenance and cure since he did not show that he was on authorized shore leave, nor that he was answerable to the call of duty. In fact, the court found he was not serving any direct or indirect interest of the employer. The same circuit, however, in *Vincent* v. *Harvey Well Service*, — F.2d —, 1971 A.M.C. (C.A. 5th, 1971) reversing 309 F. Supp 964, 1970 A.M.C. 560, dated April 8, 1971, Case No. 29401, held that a deck hand on a drilling crew in-

jured in a car en route from the pier head to the assembly point near New Orleans was entitled to recover under the Jones Act as the injury occurred in the course of his employment. The *Vincent* decision specifically distinguishes the *Sellers* case. (See footnotes page 9 of the slip sheet opinion.)

Lastly, petitioner claims a conflict with *Thurnau* v. *Alcoa S.S. Co.*, 229 F.2d 73, 1956 A.M.C. 323 (C.A. 2nd, 1956) cert. den. 351 U.S. 925, 1956 A.M.C. 1008. *Thurnau* did not involve maintenance and cure, and the court below held that there was no evidence of negligence on the part of the defendant ship owner. Whether or not that case is still law in view of *Hopson*, supra, is questionable. In any event, the fact that in the case at bar *both* the decedent's driver and the decedent were being paid travel pay at the time of the accident would distinguish this case.

Having admitted plaintiff-decedent was a seaman [Pet. Br., App. p. 9], and the court having found that decedent was a seaman [Pet. Br., App. pp. 9, 14], petitioner seeks to avoid its responsibility for maintenance and cure by labeling decedent as a "day-worker" or "shore-side worker" in an attempt to fragmentize his status as a seaman. The evidence was undisputed that decedent was a seaman, that he was employed in the navigation of the vessel on which he served, and that he operated the tugs employed therewith. There is no justification for creating different classes of seamen, some of whom would be entitled to maintenance and cure, and others of whom would not.

CONCLUSION

The decisions of the courts below are patently proper and present the only logical result which could be reached. *Vincent* v. *Harvey Wells Service*, supra, and the case at bar recognize that it would be inconsistent to hold a seaman to be in the "service of the ship" and entitled to maintenance and cure, and at the same time, not "in the course of employment" and entitled to recovery under the Jones Act (assuming, of course there exists negligence of the employer or a fellow-employee). As a matter of logic, sound policy, and plain and sensible interpretation of the phrase "in the course of his employment," a seaman should be protected by the Jones Act while traveling to and from his vessel, particularly when quarters are not provided aboard the vessel, the vessel is transistory, the seaman is required to be picked up at different places and at different times, and the seaman is receiving "travel pay" from his employer.

The petition for certiorari should be denied.

Respectfully submitted,

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Judith Barbara Williamson